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SUPREME COURT OF THE UNITED STATES

TUAN VAN TRAN, Petitioner-Appellant v. GARY LINDSEY, Respondent-Appellee	Docket #

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner-Appellant
TUAN VAN TRAN

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Circuit court erred in denying Petitioner's Petition for Writ of Habeas Corpus on the grounds that his trial counsel was ineffective for (A) withdrawing a motion to suppress evidence due to a lack of probable cause to arrest him and for (B) failing to file a motion to suppress in and out of court identifications of Petitioner;

2. Whether the Circuit court erred in denying Petitioner's Petition for Writ of Habeas Corpus on the grounds that his trial counsel was ineffective for failing to object to the bringing of the co-defendant while in custody (who was not jointly tried with Tran) into the courtroom for identification;

3. Whether the Circuit court erred in denying Petitioner's Petition for Writ of Habeas Corpus on the grounds that the in court identification of his co-defendant rendered the trial unfair, thereby denying him due process.

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CITATIONS OF THE REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE

The United States Court of Appeals, 9th Circuit opinion and order is found in case number 98-56251.

The United States District Court for the Southern District of California opinion and order is found in case number CV-96-02161-BTM.

BASIS FOR JURISDICTION IN THE SUPREME COURT OF THE UNITED STATES

This appeal is from the Ninth Circuit Court of Appeals decision entered May 16, 2000, which affirmed the district court's denial of Petitioner's writ of habeas corpus. This Court has jurisdiction under 28 U.S.C. §2254.

BASIS FOR JURISDICTION IN THE NINTH CIRCUIT COURT OF APPEALS

The Ninth Circuit Court of Appeals has jurisdiction over appeals from orders denying Petitions for Writ of Habeas Corpus under 28 U.S.C. §2253 and §2254.

CONSTITUTIONAL PROVISIONS INVOLVED

1. In all criminal prosecutions, the accused shall enjoy the right to . . .to have the Assistance off Counsel for his defence. U.S. CONST. amend. VI.
2. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, §1.

STATUTES INVOLVED IN THE CASE

1. 28 U.S.C . §2254(b), as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996.

PROCEEDINGS AND DISPOSITION IN THE STATE COURT, DISTRICT COURT, AND THE CIRCUIT COURT OF APPEALS

Appellant was charged in an Information the Superior Court of the State of California with violating the following Penal Code sections:

Ct. 1:	Penal Code §187(a) - Murder (2/2/89);
Ct. 2:	PC§211, 212.5 (a) - Robbery of inhabited dwelling (2/2/89);
Ct. 3:	PC§211, 212.5 (a) - Robbery of inhabited dwelling (1/18/89);
Ct. 4:	PC§211, 212.5 (a) - Robbery of inhabited dwelling (2/11/89).
Ct. 5	PC§245(a)(2) - Assault with a firearm (2/11/89)

He entered a plea of not guilty and a jury trial began on June 9, 1989. Petitioner testified at his trial. He was convicted of counts 1-4. He was acquitted on count five.

Appellant was sentenced to 36 years to life on July 5, 1989.

Petitioner appealed from the judgment of conviction in the Court of Appeal, Fourth Appellate District of the State of California (Case number D011037) The verdict was affirmed in a decision on January 23, 1991. Petitioner filed a petition for review in the Supreme Court of the State of California (Case number S019829) which was denied on April 10, 1991.

On September 16, 1993, Petitioner filed a petition for writ of habeas corpus with the United States District Court, Southern District (Civil No. 93-1403K), alleging two grounds:

(1) INEFFECTIVE ASSISTANCE OF COUNSEL due to the failure of counsel to make a motion to suppress both the in-court and out-of-court identifications; and

(2) Petitioner's DUE PROCESS rights were violated when his co-defendant was brought into the courtroom while in custody for identification by the arresting officer.

The District Court found that Petitioner had only partially exhausted his state claims. The court ruled that Petitioner has exhausted his state claim regarding ineffective assistance of counsel due to the failure to make a motion to suppress both the in-court and out-of-court identifications, but found that Petitioner had not exhausted his claim that his due process rights were violated when his co-defendant was brought into court to be identified by the arresting officer. The court dismissed the petition without prejudice on August 11, 1994 for failure to exhaust state remedies.

Petitioner filed a petition for writ of habeas corpus with the California Supreme Court raising the DUE PROCESS issue. The Supreme Court (case number S040479) denied his petition on

October 28, 1994, without granting an evidentiary hearing (exhibit 3).

Petitioner subsequently (on January 6, 1995) refiled a Petition for Writ of Habeas Corpus with the United States District Court, Southern District (Civil No. 95-0018-B(Por) [consolidated case Civil No. 95-0106-B(Por)], presenting two grounds:

(1) INEFFECTIVE ASSISTANCE OF COUNSEL due to the failure of counsel to make a motion to suppress both the in-court and out-of-court identifications; and

(2) INEFFECTIVE ASSISTANCE OF COUNSEL due to trial counsel allowing Petitioner's co-defendant to be brought into court to be identified by the arresting officer.

The District Court again ruled that Petitioner had exhausted his state remedies regarding his first claim, but had not regarding his second claim. The court found that in Petitioner's 1994 petition to the California Supreme Court he had raised the issue of the error of the trial *court* in allowing the co-defendant to be brought into court, but had not raised the issue as then presented in the District Court, i.e., that trial *counsel* erred in allowing the co-defendant to be brought into court. That petition was dismissed without prejudice.

Petitioner filed yet another Petition for a Writ of Habeas Corpus in the Supreme Court of the State of California (No.S049349), alleging trial counsel's ineffective assistance for allowing the co-defendant to be brought into court. That petition was denied on December 20, 1995.

Petitioner filed a Petition for Writ of Habeas Corpus in the U.S. District Court for the Southern District of California on December 18, 1996 on the following grounds:

Ground one: Petitioner was denied effective assistance of counsel by defense counsel's withdrawal of a California Penal Code §1538.5 motion to suppress evidence and by trial counsel's failure to file a common law motion to suppress the out-of-court and in-court identifications of Petitioner.

Ground two: Petitioner was denied effective assistance of counsel by trial counsel's allowing the co-defendant while in custody to be brought into the courtroom for identification by an arresting officer.

Ground three: Petitioner was denied his due process right to a fair trial in violation of the 14th amendment to the United States Constitution when his co-defendant was brought into the courtroom in custody for identification by an arresting officer. The officer's identification of the co-defendant was irrelevant to the issues at Petitioner's trial and presentation of this evidence prejudiced Petitioner and denied him a fair trial.

An Order denying Petitioner's Writ of Habeas Corpus was filed on 4/28/98.

Petitioner filed an appeal with the Ninth Circuit Court of Appeals. On May 16, 2000, the Ninth Circuit Court of Appeals affirmed the district court's decision.

STATEMENT OF FACTS

Petitioner was charged with committing a residential robberies and a murder at three locations in San Diego County. The robbers were viewed by the several victims for various but limited periods of time. The robbers were described as being young Vietnamese men of medium height and build.

Petitioner testified that he was returning home when Tho Tran called his name and asked him for a ride. Tran was friends of Tho's brother, but not Tho.

Petitioner gave Tho a ride to Tho's house.

When they arrived, Petitioner waited outside and saw several police officers walk by his car. After a few minutes, one of them came up and asked for his name and he answered "Tuan Tran" and gave his driver's license. He was removed from the car,

handcuffed, and when the officers wouldn't tell him why he was being arrested, he thought it was because of gambling.

Petitioner consented to a search of his car. A knife was found in Petitioner's car. Petitioner was arrested and placed in custody. A live lineup was conducted thereafter. Twenty people were present at the lineup. Five of the twenty identified Petitioner as one of the robbers.

Petitioner was arraigned in the Superior Court. His counsel prepared and filed a Motion to Suppress Evidence. On the day it was scheduled to be heard, trial counsel went to the court and withdrew the motion

Trial counsel had notice that the live lineup was unduly suggestive from the comment of the Public Defender who was present at the time of the lineup and from her observation as well as from the photograph of the live lineup which she had in her possession. Trial counsel did not bring a motion to suppress the lineup identification and did not bring a motion to suppress the in-court identifications as having been tainted by the suggestive line-up.

A jury trial was conducted and Petitioner was identified as one of the robbers.

Petitioner presented a defense of mistaken identity and proof that he was at a family gathering when the Tran home was robbed and Le shot. Several of Petitioner's relatives testified that during that evening he was with his family celebrating an annual ancestor's ritual holiday.

The knife the officers found belonged to his wife, which she used to peel fruit. (His wife testified that she was pregnant, and had cravings for fruit)

ARGUMENT

I.

THE AEDPA DOES NOT CONTROL THE INSTANT PETITION WHICH WAS ORIGINALLY FILED BEFORE THE EFFECTIVE DATE OF THE ACT.

The Circuit Court of Appeals opinion states that the instant habeas corpus petition is governed by the provisions of 28 U.S.C. § 2254 (d) as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996.

However, the AEDPA does not control the instant petition. The AEDPA is not retroactively applied to habeas petitions filed before the Act's effective date of April 24, 1996. (*Jeffries v. Wood* 103 F.3d 827 (9th Cir. 1996.).)

The Circuit Court opinion states that a second petition does not relate back to a first petition where the first petition was dismissed for failure to exhaust state remedies, and therefore AEDPA is applicable. Petitioner asserts this is an error. The original petition was filed in the United States District Court, Southern District on September 16, 1993. At that time, the petition was dismissed without prejudice after the Court determined Petitioner had failed to exhaust state remedies.

The petition was refiled on January 6, 1995, but again the petition was dismissed without prejudice for failure to exhaust state remedies as to Petitioner's second claim. After Petitioner went back to the California Supreme Court which rejected the precise issue raised presently, Petitioner again refiled the instant petition on December 18, 1996.

The original petition was filed three years before the effective date of AEDPA. The court never addressed the issues on the merits and simply dismissed the petition without prejudice for failing to exhaust state remedies. Petitioner's refiling of the same petition after exhausting his state remedies must be considered an amended petition rather than a new petition.

II

TRIAL COUNSEL'S WITHDRAWAL OF THE PENAL CODE SECTION 1538.5 SUPPRESSION MOTION DENIED Petitioner THE EFFECTIVE ASSISTANCE OF COUNSEL.

The police arrested Petitioner on February 11, 1989. The fruits of that arrest were devastating to Petitioner's case. As a result of that arrest the following evidence was found and used against Petitioner: (1) the detention of Petitioner for three days such that he was placed in a live line-up three days later and identified by five victims; (2) a ring which Petitioner was wearing and which was identified as being the product of a robbery; (3) a knife seized from his car; and (4) his fingerprints, which were

compared and found to match some of those found at a victim's home.

At trial, Petitioner presented a sound factual response to each of these pieces of evidence. He challenged (1) the victim's identifications at the lineup by establishing that the lineup was so grossly unfair and suggestive it all but placed a big sign on his chest with the words "pick me" emblazened thereon. Petitioner further presented that the in-court identifications were made under circumstances where the only person the witnesses looked at was Petitioner and each of them had already seen him under the extremely suggestive circumstances of the lineup.

Regarding (2) the ring, Petitioner admitted that he was wearing a ring when he was arrested but that it was similar to, but not the same as, the ring admitted into evidence.

Regarding (3) the knife from his car, Petitioner stated that it belonged to his wife who used it to peal fruit. (Petitioner also established that the knife was never identified as being linked to the case and the knife itself was not admitted into evidence.

Testimony regarding the knife was, however, not stricken from the record.)

Finally (4), as to the fingerprints, Petitioner presented a consistent pattern of police tampering that cast a huge doubt over the legitimacy of the fingerprint and its receipt.

Petitioner asserts that his trial lawyers filing and then withdrawing a challenge to the evidence was error and prejudicial.

The Circuit Court started its analysis by determining if the withdrawal of the motion was prejudicial. The court evaluated whether or not the motion would have been granted had it been pursued. The Circuit court concluded that the motion would have granted, and that the conclusion by the state court that the motion to suppress would have been denied was error. However, the Circuit stated that this was not "clear error" as required under AEDPA and therefore Petition should be denied.

(The District Court's Order asserting that the withdrawal of the motion was a matter of strategy was rejected by the Circuit of Appeals.)

The decision of the Circuit Court is not supported by clear U.S. Supreme Court law on the facts of this case.

The foundation for the officer's "probable cause" is as follows:

1. Petitioner and co-defendant Tho Tran gave inconsistent stories about being together as they arrived at Tho's residence;

2. Petitioner was in a car with an identified robbery suspect the same day a robbery had occurred;

3. Petitioner's first name matched the name heard by a victim at a robbery several days earlier;

4. Petitioner fit the general description of the robber as being young Vietnamese males of medium height and build.
Points one, two, and three ARE in dispute.

Point one: The claim by the officer that Petitioner told him that he had met Tho earlier in the day and had, as a favor to Tho, driven him to his house is not in dispute. But the claim by the officer that Tho had given him a different version of how he had gotten to his apartment IS in dispute. This information was received at only time - at the Preliminary Hearing and it was never challenged or probed. It did not exist on any police report, it was mentioned for the first time at the Preliminary Hearing, almost in

passing, and counsel specifically did NOT use the opportunity of the Preliminary Examination to bring the suppression motion or to challenge the witness.

Petitioner never had the benefit of an attorney who asked the critical questions that needed to be asked: Was Tho's statement given in Vietnamese (the officer doesn't speak Vietnamese)? Had Tho understood the officer's question put to him in English? What were Tho's English skills? Had Tho responded correctly to the officer's question? What did the other witnesses to the officer's question and to Tho's answer say regarding whether the discussion was in Vietnamese or English and whether the officer asked the question clearly and whether Tho responded clearly? (There were at least 16 other witnesses in the house at the time.) What was the manner in which the officer related this information when he testified? Was his credibility attacked by the fact that he had lied to defense counsel and to the district attorney regarding other matters in the discovery? Was his credibility attacked by a showing of distinct bias as manifested by his creation of a line-up which was patently unfair? Did a single judicial officer have the

opportunity to judge the credibility of the police officer who made this statement?

These questions were never presented. These issues were never probed nor tested - not at the Preliminary Hearing, not at a pre-trial motion - because counsel withdrew the motion, and not at the trial where the issue was not litigated. No judge heard this evidence and no judge ruled that this point was in fact established.

Point two: Petitioner does not dispute that he was in a car with an identified robbery suspect on the same day a robbery occurred. But Petitioner does dispute a number of factors regarding this point. First, there is no evidence whatsoever that the officer who arrested Petitioner *knew* that there had been a robbery on the day of Petitioner's arrest (February 11, 1989). The officer arrested Petitioner for his participation in the February 2, 1989 robbery. This matter was never probed and presented to a magistrate to determine exactly what was the state of the knowledge of the police officer. No magistrate ever ruled that there was sufficient cause for the arrest and no magistrate ever made an independent finding of fact regarding this matter.

Petitioner's rights were further abrogated. Because the motion was withdrawn prior to litigation, no magistrate was ever presented with the evidence that the arresting officer knew that there had been a nine day surveillance of Tho, and in that entire nine day surveillance of Tho, neither Petitioner nor Petitioner's car ever crossed the surveillance. The magistrate was never presented with the extensive nature of that surveillance because the motion was withdrawn. The magistrate was never presented with the fact that the police officer knew that the very victims who had identified Tho had not identified Petitioner during photo lineup was not presented.

Point three: Petitioner concedes that the arresting officer believed that the victim of the February 2, 1989 robbery heard one of the other robbers say: "Tuan, turn off the volume." Petitioner contends however, that because his motion was withdrawn it was never presented to a magistrate ruling on the search or to any reviewing judge that the name "Tuan" is the most common of Vietnamese names - the equivalent to the name "John" in English. It was never established that the arresting officer knew that the

name was very common and it was never established how very common the name "Tuan" is. The three state appellate justices acknowledge the significance of the commonality of the name and further acknowledge that this point must therefore be diluted to some degree, but since they were never presented with a factual basis to decide how very common the name is they did not know how fully they should dilute this point.

It should be noted that the failure of Petitioner's counsel to factually establish how common the name is was a point which the prosecutor raised in his Points and Authorities in Opposition to Petitioner's withdrawn Motion to Suppress evidence **Factual conclusion:** In essence, the only facts establishing that the officer had probable cause to arrest Petitioner is (1) that Petitioner gave a truthful statement to the officer that he drove Tho to his house; (2) that this was done nine days after the robbery for which Petitioner was arrested and that this was the only time that Petitioner had been in the presence of Tho during the many days of police surveillance of him; (3) that Petitioner and the robber share (perhaps) the most common Vietnamese name which may

represent a huge percentage (50%?; 33 1/3%?) of the male Vietnamese population and (4) Petitioner fit the general description of the robber in that he was a young Vietnamese male of medium height and build.

The Law: "Probable cause by association" is specifically forbidden as sufficient grounds for arrest and search. *U.S. v. Hillison,* 733 F.2d 692 (9th Cir. 1984); *U.S. v. Robertson* 833 F.2d 777 (9th Cir. 1987).

The fact that Petitioner generally fit the description of the assailant doesn't provide probable cause. (*U.S. v. Ricardo D*, 912 F.2d 337 (9th Cir. 1990). Whereas, the above factors might justify a detention, *(Terry v. Ohio* [1968] 392 U.S. 1; 20 L.Ed.2d 889, 88 S.Ct. 1869), the extension of the detention into the type of circumstances herein are not justified. The scope of a detention is limited. "In the name of investigating a person who is no more than suspected of criminal activity, the police may not . . . . seek to verify their suspicions by means that approach the conditions of arrest." *Florida v. Royer* (1983) 460 U.S. 491, 499 [75 L.Ed.2d 229, 103 S.Ct. 1319].

Any claim that even if the arrest was illegal, the subsequent identifications and fingerprint evidence would not have been suppressed because they were purged of the taint of the illegal arrest should be rejected.

First, Petitioner's presence in the lineup was the direct result of his arrest. Petitioner was taken into custody on February 11th and held until he appeared in a lineup on February 14th. There is no explanation as to how the police would have lawfully secured Petitioner's presence in that lineup independent of the February 11th arrest. Police may not, without probable cause, transport a suspect to the police station for purposes of photographing the defendant (*United States v. Crews* [1979] 445 U.S. 463, 63 L.Ed.2d 537, 100 S.Ct. 1244) or placing him in a line-up. (*Hayes v. Florida*, supra at 816.)

Second, the fingerprints taken from Petitioner at the time of this arrest were compared to those found at the scene of the February 2 robbery and shooting. In fact, respondent acknowledges that "[a]s a result of the fingerprinting, officers were able to find Petitioner's fingerprints on [several pieces of

evidence], all located inside the 4106 Polk Avenue house where the February 2 robbery and murder took place."

Thus, under respondent's own statement of facts, there was no intervening act to purge the fingerprint identification from the illegal arrest. Police may not, without probable cause, transport a suspect to the police station for purposes of obtaining fingerprints (*Hayes v. Florida* [1985] 470 U.S. 811, 84 L.Ed.2d 705, 205 S.Ct. 1643; *Davis v. Mississippi* [1969] 394 U.S. 721, 22 L.Ed.2d 676, 89 S.Ct. 1394).

Third, the seizure of the knife from Petitioner's car cannot be said to be purged of the taint of the illegal arrest simply because Petitioner consented to the search. (*Florida v. Royer* (1983) 460 U.S. 491, 501-508 [75 L.Ed. 229, 103 S.Ct. 1319].) Petitioner's consent immediately followed his arrest, and thus was a direct result of the unlawful arrest. (*United States v. Delgadillo-Velasquez* 856 F.2d 1292, 1299-1300 (9th Cir. 1988) [consent not sufficiently attenuated when obtained within minutes of illegal arrest]; *United States v. Ceballos* 812 F.2d 42, 49-50 (2d Cir. 1987.)

Moreover, the in-court identifications were also subject to suppression, unless the People were able to establish that they were not tainted by the prior illegal detention and subsequent lineup identification. *United States v. Crews*, supra, 445 U.S. at pp 572-473.

Conclusion: Petitioner *did* fit the general description of the robbers, in that he was between 5 feet and 5 ft 5 inches tall, Vietnamese, and between the ages of sixteen and twenty. We shouldn't check our common sense at the court house entrance - thousands of Vietnamese residents in San Diego fit this description (it might be postulated that the only ones in the community who didn't were in the lineup used in this case).

The facts which the officer knew at the time they initiated the search did not provide probable cause for their conduct and a motion attacking that search would have been granted.

Claude Rains' words to his sergeant in the presence of Humphrey Bogart: "Round up the usual suspects", may have been acceptable justification for police conduct in *Casablanca*, it is not acceptable in the case at bar.

III.

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF TRIAL COUNSEL'S FAILURE TO FILE A COMMON LAW MOTION TO SUPPRESS THE SUGGESTIVE LINEUP AND THE RESULTING OUT-OF-COURT AND IN-COURT IDENTIFICATIONS.

Perhaps no where else throughout the entire criminal justice system is there a more dangerously unreliable witness than one who states categorically that her eyewitness identification is correct. Yet, at the same time, perhaps no where throughout our justice system is there a more persuasive witness.

It is that combination of manifest unreliability wrapped in a cloak of apparent accuracy that explains why so many cases of eyewitness identification have been shown to result in the conviction of the wrong person. It undoubtedly was this history which motivated Justice Felix Frankfurter to issue the words:

> "The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials."
> *United States v. Wade.*

There is truly no dispute in this case that the only contested issue was the identification of the perpetrator. The District Attorney so acknowledged this in his closing statement and the very first thing that the District Attorney pointed to in arguing that Petitioner was the perpetrator was the eyewitness identification of the witnesses. Defense counsel also focused on this issue, discussing at length the eyewitness identification and the lineup. There is also no dispute that the in-court identifications only came about after each of the witnesses attended that fateful lineup on February 15, 1989, where Petitioner was so obviously highlighted.

Yet despite that history, and despite the fact that trial counsel was fully informed that the line-up in this case was fatally flawed, and further despite the fact that trial counsel actually prepared and wrote a motion to challenge the line-up identifications in this case, trial counsel inexplicably never filed the motion, and never sought to challenge the suggestibility of the lineup.

Richard Pryor used to do a stand-up routine where he mocked the fairness of a live line-up conducted by police who were anxious to get a conviction of a suspect. He used to joke that

when a "brother" stood in a line-up, he stood right in the middle of a "refrigerator, a nun, and a goose", and it was little wonder that he always seemed to get picked out. Pryor should have been talking about this line-up.

Person number 1, 5, and 6 are twice as old as the eighteen year old Petitioner and twice as old as the 18-20 age range of the suspect. Person number 2 has a mustache - where the assailant did not; person number 3 looks like a sumo wrestler, and is hardly a medium to thin build. On top of that, it is only Petitioner whose hair is not balding or very closely cut or in anyway matches the description of the assailant.

It is little wonder that the line-up was so flawed as the Detective in charge stated that he created the line-up without any consideration to the age of the persons and without consideration as to whether the participants were clean shaven (as described by the witnesses) or had facial hair.

In addition to the memo, trial counsel was aware that a number of factors present in the trial made the eyewitness identifications extremely suspect, including:

1. Witness Nachampasak went to the line-up with the *expectation* to pick someone out because police had told her that they had arrested someone and she would see them at the line-up;
2. Witness Nachampasak knew that her assailant was Vietnamese, believed only two of the line-up participants were Vietnamese;
3. Witness Nachampasak's ability to observe clearly and recall clearly were impacted by the fact that she was fearful during the robbery because of the presence of weapons and the danger to her family:"I was so scared, I was shaking that day".
4. Her total observational period was 10 minutes, split amongst three assailants, and a fixation of looking at the guns that the assailants had.
5. She saw Petitioner alone at the Preliminary Examination.
6. Tuan Ahn Tran did not identify Petitioner at the line-up
7. Loan Kim Do was very frightened and spent time looking at the weapons;
8. Loan Kim Do went to the line-up with the expectation of seeing someone that the police had arrested;
9. She saw Petitioner alone at the Preliminary Examination.
10. Von Hong Nguyen saw the robber only twice for a moment each
11. Von Hong Nguyen was fearful of a the gun involved
12. Von Hong Nguyen was mistaken as to the nationality of the men
13. Nhan Nguyen was sleeping when first made observation
14. Nhan Nguyen's went to the line-up believing that police had arrested some people

15. Nhan Nguyen's observational period was 6 seconds

The Circuit Court concluded that the state court's denial of this issue was not clear error. This conclusion is not supported by the facts herein.

In order to be fair, a line-up should contain people with as many similarities as possible, such that the results won't be "suggested" by the fact that the "prime suspect" stands out in that he is the only one of his age, the only one of his weight, the only one of his facial hair, the only one of his body build, the only one who fits the description. It is absolutely manifest that Petitioner standing in position number 3 is not one of six people who might have fit the description of the robbers; he is not one of five or four or three or two - he is one of one. He might as well have been standing in the line-up alone.

IV.

ALLOWING THE IN-COURT IDENTIFICATION OF ACCOMPLICE THO TRAN VIOLATED PETITIONER'S DUE PROCESS RIGHTS AND TRIAL COUNSEL'S FAILURE TO STOP THE PREJUDICIAL PROCEDURE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

The Circuit Court found that the trial court decision of allowing the accomplice Tho Tran to be brought into the courtroom for Officer Larmour to identify as the person who arrived at the house during the search and was arrested was harmless. This conclusion is in error.

The defense strategy to present a scenario whereby the police, having found Tran in Tho's company, were unable to resist the temptation to arrest him even though they had no solid evidence against him, in the hopes they would be able to build a case after the arrest was ineffective. Since there was no dispute Tho was the person arrested with Tran, there was no need for the officer to identify Tho to the jury. The evidence was irrelevant and should not have been admitted.

Trial counsel's failure to keep the improper identification procedure from the jury must be held to be incompetent.

The error denied Petitioner his federal constitutional right to a fair trial. As such, his conviction must be reversed unless the prosecution can show that Tho's appearance at Petitioner's trial was harmless beyond a reasonable doubt. (*Rose v. Clark* (1986) 478 U.S. 570 [92 L.Ed.2d 460, 106 S.Ct. 3101].)

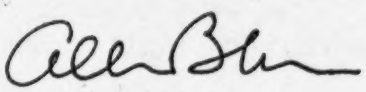
Petitioner presented a strong alibi defense to the charges. He and several of his family members and friends testified that he was home on the evening of February 2, 1989 celebrating a Vietnamese holiday. Defense counsel argued that Petitioner was never a suspect in the case and that the case against him was built after his arrest. As stated above, the jurors were aware that several of the witnesses had identified Tho from a lineup. Under these circumstances, Tho's appearance during trial very likely affected the jury's evaluation of the credibility of the identifications of the witnesses and Petitioner's defense. Thus, it cannot be said that Tho's appearance at Petitioner's trial was harmless beyond a reasonable doubt.

The errors by the trial court and trial counsel in permitting the in-court identification were prejudicial and require reversal of Petitioner's convictions.

CONCLUSION

For all of the above reasons, appellant requests that this Court reverse the district court's denial of his Petition for Writ of Habeas Corpus.

DATED: August 11, 2000 RESPECTFULLY SUBMITTED,



ALLEN BLOOM
ATTORNEY AT LAW

PROOF OF SERVICE

CASE NAME: *TUAN VAN TRAN V. GARY LINDSEY, WARDEN*
CASE NO.:

I DECLARE:

I am citizen of the United States and a resident of the County of San Diego, State of California. am over the age of 18 and not a party to the within action. My business address is 1551 Fourth Avenue, #801, San Diego, California 92101-3156.

On AUGUST 11, 2000 I served the foregoing document described as:

PETITION FOR WRIT OF CERTIORARI

by placing the original and 40 copies to

UNITED STATES SUPREME COURT
1 FIRST STREET, N.E.
WASHINGTON, D.C. 20543

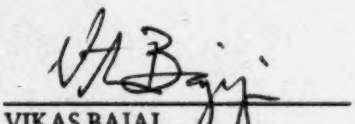
and 3 copies thereof in a separate envelope for each addressee named hereafter, and sealing each envelope and, with the postage thereon fully prepaid, depositing each in the United States mail at San Diego, California. Each enveloped was addressed to each such addressee respectively as follows:

ATTORNEY GENERAL OF STATE OF CALIFORNIA
Garrett Beaumont
Supervising Deputy Attorney General
P.O. Box 85266
San Diego, California 92186-5266

and one copy to
Mr. Tuan Van Tran, E-31757
Salinas Valley State Prison
D-3-127-Low
P.O. Box 1050
Soledad, Cal. 93960-1050

Executed on August 11, 2000 at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



VIKAS BAJAJ